SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1921.

The Standard Fashion Company, Petitioner, *vs.* Magrane-Houston Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 10, 1922.]

Mr. Justice Day delivered the opinion of the Court.

Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called standard patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals. 259 Fed. 793.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods business at the corner of Washington Street and Temple Place in the city of Boston. On November 14, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of standard patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereinafter provided. Petitioner agreed to sell to respondent standard patterns at a discount of 50% from retail prices, with advertising matter and publications upon terms stated; and to allow respondent to return discarded patterns semi-annually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped from time to time thereafter. The contract provided that patterns returned for exchange must have been purchased from the respondent and must be delivered in good order to the

general office of the seller in New York. Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, $1,000 value in standard patterns at net invoice price, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. Respondent agreed not to assign or transfer the agency, or to remove it from its original location without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell standard patterns except at labelled prices. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of standard patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party three months' notice in writing within thirty days after the expiration of any contract period, the agency to continue during such three months. Upon expiration of such notice respondent agreed to promptly return to petitioner all standard patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths cost. Neglect to return the pattern stock within two weeks after the expiration of the three months' notice to relieve the petitioner from all obligation to redeem the same. It was further stipulated that in the event the business property of the respondent, or a substantial part thereof, should be disposed of by respondent for business other than that of dry goods or as a general department store, the respondent should have the privilege of terminating the contract by giving the petitioner due notice of such change. Two weeks after the change in the premises had been made the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

We agree with the courts below that the notices not having been given as required by the contract, the same continued in force until three months from November 25, 1918, to wit, to February 25, 1919. It is contended in the brief for the Government, filed by it as *amicus curiae*, that as the date last mentioned had elapsed pending the suit, the case has become moot, but we are unable to agree with

such contention. The bill prayed an assessment of damages as far as capable of ascertainment. The record shows that such damages were capable at least of partial ascertainment.

The suggestion that the respondent had wound up its affairs, and had gone out of business on March 27, 1920, is met by the General Laws of Massachusetts, Section 51, continuing its corporate existence for the period of three years for the purpose of prosecuting or defending suits by or against it.

The principal question in the case and the one upon which the writ of certiorari was granted involves the construction of Section 3 of the Clayton Act, 38 Stats. 731. That section, so far as pertinent here, provides:

"It shall be unlawful . . . to make a sale or contract for sale of goods . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company.

It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture, but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington Street and Temple Place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. *Straus et al.* v. *Victor Talking Machine Co.*, 243 U. S. 490.

The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the Third Section of the Clayton Act because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly."

The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890. The latter Act had been interpreted by this Court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. The construction since regarded as controlling was stated in the *Standard Oil* case, 221 U. S. 1, 58, wherein this Court construed the Act as intended to reach combinations unduly restrictive of the flow of commerce or unduly restrictive of competition. It was said that the Act embraced:

"All contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." See also *United States* v. *American Tobacco*, 221 U. S. 106; *United States* v. *St. Louis Terminal Co.*, 224 U. S. 383; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S.

20; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Company*, 226 U. S. 324; *Nash* v. *United States*, 229 U. S. 373; *Straus* v. *American Pub. Assn.*, 231 U. S. 22.

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which "may substantially lessen competition or tend to create a monopoly."

Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports. See *Railroad Commission of Wisconsin et al.* v. *C. B. & Q. R. R. Co.*, decided February 27, 1922, *ante*, page —, and previous decisions of this Court therein cited.

Section Three condemns sales or agreements where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that of 52,000 so-called pattern

agencies in the entire country, the petitioner, or its holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals summarizing the matter pertinently observed:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business."

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.